NO. 48543-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION RWO

STATE OF WASHINGTON,

Respondent,

v.

ISAAC QUITIQUIT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Melissa Hemstreet, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

A. ASSIGNMENTS OF ERROR

1. The trial court's failure to properly instruct the jury deprived Appellant of a fair trial and constitutionally unanimous jury verdicts.

2. The trial court erred by imposing sentences that exceed the statutory maximum for Appellant's crimes of conviction.

Issues Pertaining to Assignments of Error

1. Was Appellant deprived of his constitutional right to a fair trial and unanimous jury verdicts where the court failed to instruct that deliberations must include all jurors at all times?

2. The statutory maximum sentence for a Class C felony is 60 months (five years). Did the trial court err by imposing 70-month sentences on each of the two Class C felonies for which Appellant was convicted?

B. STATEMENT OF THE CASE

On December 11, 2014, law enforcement executed a search warrant at the home of Appellant Isaac Quitiquit, which led to his arrest and the filing of an information by the Kitsap County Prosecutor charging him with two counts of third degree child rape.

CP 5-7; 1RP[1] 56-58. The State alleged Quitiquit raped his 14-year-old niece, E.U., on May 31, 2014, and again on June 8, 2014, while she was spending the night at his home. CP 4. Quitiquit pleaded "not guilty" to both charges and the matter proceeded to a jury trial before the Honorable Melissa A. Hemstreet. 1RP 5-6. The jury convicted Quitiquit as charged, and he now appeals. CP 36, 55-56; 1RP 358-60.

The State's primary witness was E.U., who testified Quitiquit groped her breasts, "fingered" her vagina, and kissed her vagina over the course of two weekends in May and June 2014, when she was 14 and Quitiquit was in his thirties. 1RP 232-77.

The State also presented the testimony of a sexual assault nurse, who admitted her full-body examination of E.U. failed to confirm or dispel any claim of rape. 1RP 95-115. Similarly, a Washington State Crime Lab technician admitted she was unable to find E.U.'s DNA on any evidence collected from Quitiquit's home. 1RP 120-39.

The State also introduced Quitiquit's statement to police following his arrest. Quitiquit, when asked if he would waive his rights and provide a statement, initially asked, "What's going to happen if I talk or don't

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[1] There are three volumes of verbatim report of proceedings cited as follows: 1RP - two-volume consecutively paginated set for the dates of December 8-9 & 14-16, 2015 (trial); and 2RP - January 15, 2016 (sentencing).

talk?" 1RP 88. But then Quitiquit offered that he loved his niece, would do anything to protect her, and that she had told him things he vowed to take to his grave. Id.

E.U.'s mother, Cynthia Uptain, testified that when she confronted her brother about the allegations, Quitiquit told her E.U. had told him things he promised to take to his grave, and that he was still eligible for communion at their church, which Uptain interpreted as a denial of any sexual impropriety. 1RP 205, 223, 229.

The jury learned E.U. did not confide with any authority figures about Quitiquit's alleged abuse until after mid June, when her mother saw E.U.'s diary open on a page setting forth what her uncle had allegedly done to her. 1RP 148-50, 213, 260-61. Several months later in November 2014, E.U. also revealed her allegations against Quitiquit to a counselor, who was obligated to notify law enforcement about them, which led to the charges. 1RP 201, 208, 261-62.

C. ARGUMENTS

1. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY THAT DELIBERATIONS MUST INCLUDE ALL TWELVE JURORS AT ALL TIMES DEPRIVED QUITIQUIT OF A FAIR TRIAL AND UNANIMOUS JURY VERDICTS.

By failing to instruct that deliberations must involve all twelve jurors collectively at all times, the trial court violated Quitiquit's right to a

fair trial and unanimous verdicts. This Court should therefore reverse and remand for a new trial.

In Washington, criminal defendants have a constitutional right to trial by jury and unanimous verdicts. Wash. Const. art. I, §§ 21 & 22[2]; State v. Ortega–Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). One essential elements of this right is that the jurors reach unanimous verdicts, and that the deliberations leading to those verdicts be "the common experience of all of them." State v. Fisch, 22 Wn. App. 381, 383, 588 P.2d 1389, 1390 (1979) (citing People v. Collins, 17 Cal.3d 687, 552 P.2d 742 (1976)). Thus, constitutional "unanimity" is not just all twelve jurors

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[2] Wash. Const. art I, § 21 provides:

> The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash Const. art I, § 22 provides:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: . . .

coming to agreement. It requires they reach that agreement through a completely shared deliberative process. Anything less is insufficient.

The Washington Supreme Court recently concurred with the California Supreme Court's description of how a constitutionally correct unanimous jury verdict is reached, and how it is not:

> "The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them. It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11. Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint."

State v. Lamar, 180 Wn.2d 576, 585, 327 P.3d 46 (2014) (quoting Collins, 17 Cal.3d at 693).

This heightened degree of unanimity necessitates, for example, that when a juror is replaced on a deliberating jury, the reconstituted jury must be instructed to begin deliberations anew. State v. Ashcraft, 71 Wn. App. 444, 462, 859 P.2d 60, 70 (1993) (citing CrR 6.5). Failure to so instruct deprives a criminal defendant of his right to a unanimous jury verdict and requires reversal. Lamar, 180 Wn.2d at 587-89; State v. Blancaflor, 183 Wn. App. 215, 221, 334 P.3d 46 (2014); Ashcraft 71 Wn. App. at 464. A trial court's failure to properly instruct the jury on the constitutionally

required format for deliberating towards a unanimous verdict is error of constitutional magnitude that may be raised for the first time on appeal. Lamar, 180 Wn.2d at 585-86.

Sometimes jurors receive instruction that at least touches on the need for this heightened degree of unanimity, such as in California, where at least one jury was instructed they "'must not discuss with anyone any subject connected with this trial,' and 'must not deliberate further upon the case until all 12 of you are together and reassembled in the jury room.'" Bormann v. Chevron USA, Inc., 56 Cal. App. 4th 260, 263, 65 Cal. Rptr. 2d 321, 323 (1997) (quoting BAJI No. 1540, a standardized jury instruction); see also, United States v. Doles, 453 F. App'x 805, 810 (10th Cir. 2011).("court instructed the jury to confine its deliberations to the jury room and specifically not to discuss the case on breaks or during lunch."). In this regard, the Washington Supreme Court Committee (Committee) on Jury Instructions recommends trial courts provide an instruction at each recess that includes:

> During this recess, and every other recess, do not discuss this case among yourselves or with anyone else, including your family and friends. This applies to your internet and electronic discussions as well — you may not talk about the case via text messages, e-mail, telephone, internet chat, blogs, or social networking web sites. Do not even mention your jury duty in your communications on social media, such as Facebook or Twitter. If anybody asks you about the case, or about the people or issues involved

> in the case, you are to explain that you are not allowed to discuss it.

WPIC 4.61 (emphasis added).

The Committee also recommends an oral instruction following jury selection explaining the trial process, and includes the following admonishment about the process after closing arguments are made:

> Finally: You will be taken to the jury room by the bailiff where you will select a presiding juror. The presiding juror will preside over your discussions of the case, which are called deliberations. You will then deliberate in order to reach a decision, which is called a verdict. Until you are in the jury room for those deliberations, you must not discuss the case with the other jurors or with anyone else, or remain within hearing of anyone discussing it. "No discussion" also means no e-mailing, text messaging, blogging, or any other form of electronic communications.

WPIC 1.01, Part 2.

The same instruction also provides:

> You must not discuss your notes with anyone or show your notes to anyone until you begin deliberating on your verdict. This includes other jurors. During deliberation, you may discuss your notes with the other jurors or show your notes to them.

Id.

The Committee has also prepared a Juror Handbook. WPIC Appendix A. It advises readers that as jurors, "DON'T talk about the case with anyone while the trial is going on. Not even other jurors." Id., at 9.

These WPIC-based admonishments, if provided, make clear that deliberations may only occur after all the evidence is in, and only then when jurors are in the jury room. What they fail to make clear, however, is that any deliberations must involve all twelve jurors. Thus, for example, in a four-count criminal trial, the pattern instructions do not prohibit the presiding juror from assigning three jurors to decide each count, with the understanding that the other nine jurors will adopt the conclusion of those three on that count for purposes of the unanimous verdict requirement. Such a process violates the constitutional requirement that deliberations leading to verdicts be "the common experience of all of [the jurors]." State v. Fisch, 22 Wn. App. at 383.

Here, what instructions the record shows the court did provide to Quitiquit's jury, failed to make clear the constitutional unanimity requirement that deliberation occur in the jury room, only then when all twelve jurors are present, and only as a collective.

The trial court's first on-the-record admonishment of Quitiquit's jury occurred after the selected jurors were sworn in. 1RP 41-51. This admonishment include the following explanation about the trial process following closing arguments:

> Finally, you will be taken to the jury room by the bailiff where you will select a presiding juror. The presiding juror will preside over your discussions of the

> case which are called "deliberations." You will then deliberate in order to reach a "verdict."
>
> Until you are in the jury room for these deliberations, you must not discuss the case with other jurors, or anyone else, or remain within the hearing of anyone discussing it. No discussion also means no emailing, texting, messaging, blogging, or any other form of electronic communication.

1RP 49.

The prosecutor then gave his opening statement, which was followed by the court instructing jurors on taking notes before dismissing them for the lunch break. 1RP 50-52. Despite the Committee's recommendation to give the full WPIC 4.61 before every recess, it was not provided for this lunch recess or any other recess during Quitiquit's trial.

This is not to say the court never admonished the jury. It did, but just not as recommended by the WPIC Committee. For example, following the first afternoon recess of the first day of trial the court reminded the jurors "not to discuss the case amongst yourself [sic] or with anyone else during this recess." 1RP 117. And at the end of the first day of trial the court reminded jurors to "not permit anyone to discuss or comment about [the case] in your presence." 1RP 158.

Prior to the lunch recess on the second day of trial, the court admonished the jury "not to discuss this case or any facet of this case among yourselves as a group or individually, or anyone else, or allow

anyone else to discuss it in your presence." 1RP 230. That afternoon, the only witness was E.U. before the prosecution rested and a recess was taken. 1RP 232-77. For that recess the court gave no admonishment to the jury whatsoever. 1RP 277. The same is true following the defense resting, no admonishment whatsoever. 1RP 295. The court did ask the bailiff to release the jurors for the day, and to "[r]emind them that they're not to talk about anything."

The following day jurors arrived to hear closing arguments before beginning deliberations. Prior to those arguments, however, the court inquired whether any jurors had trouble following the court's admonishments not to discuss the case with anyone, including other jurors, to which there was "no response." 1RP 305. The court then read its written instructions on the law to the jury. 1RP 306-17; see CP 19-35.

In the court's written instructions the court informed the jury "During your deliberations, you must consider the instructions as a whole." CP 22 (last page of Instruction 1). And the following instruction informs the jury that they "have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict." CP 23 (Instruction 2).

Instruction 13 instructed the jury on how to initiate and carry out the deliberative process. CP 34-35. Like the first two instructions,

Instruction 13 also reminds the jurors they each have the right to be heard during deliberations. CP 34.

Missing, however, are any written or oral jury instructions informing the jury of its constitutional duty to deliberate only when all 12 jurors are present, and only as a collective. Nor does the court ever admonishing the jurors that they were precluded from discussing the case with anyone during any recess, as recommended by WPIC 4.61 ("During this recess, and every other recess, do not discuss this case among yourselves or with anyone else, including your family and friends.").

The court's failure to instruct the jury that deliberation may only occur when all twelve jurors are present and only as a collective constituted manifest constitutional error. Lamar, 180 Wn.2d at 585-86. This error is presumed prejudicial, and the prosecution bears the burden of showing it was harmless beyond a reasonable doubt. Lamar, 180 Wn.2d at 588 (citing State v. Lynch, 178 Wash.2d 487, 494, 309 P.3d 482 (2013)).

The test for determining whether a constitutional error is harmless is "[w]hether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). Restated, "An

error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. A reasonable probability exists when confidence in the outcome of the trial is undermined." State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted). It is undermined here because the prosecution cannot meet its burden to show harmlessness.

That Quitiquit's jurors had opportunities for improper deliberations is not just theoretical. For example, the record shows the jury "left the courtroom to begin deliberations" at 10:59, and reached a verdict by 2:00 pm the same day. See CP 86-87. What is not clear from the record is whether the jurors deliberated the entire three hours, or instead broke for lunch. In light of the brief period of deliberation, there is a reasonable probability that to speed up the process so they could conclude their service, the presiding juror divided the jury in two and had six jurors decide each count, with each group agreeing to follow the recommendation of the other. Such a process would clearly violate the "common experience" requirement for constitutionally valid unanimity, but not the instructions provided by the court. Lamar, 180 Wn.2d at 585.

There is also the very likely scenario of one or more jurors leaving to briefly use a bathroom while the remaining jurors continued to discuss

the case. The jury was never instructed not to engage in such improper deliberations. As such, the jury was left ignorant about how to reach constitutional unanimity.

In light of the court's written and oral instructions, which only limited their ability to discuss the case to fellow jurors, there is a reasonable possibility some jurors discussed the case without the benefit of every other juror's presence, whether over lunch, simply walking to and from the jury room, or even in the jury room itself. Nothing informed them such discussions were not allowed. There was nothing provided to inform them their verdicts must be the product of "the common experience of all of them." Fisch, 22 Wn. App. at 383. If even just one of the jurors was deprived of deliberations shared by the other eleven, then the resulting verdict is not constitutionally "unanimous." Lamar, 180 Wn.2d at 585; Collins, 17 Cal.3d at 693. This Court should reverse and remand for a new trial. Lamar, 180 Wn.2d at 588.

2. THE COURT ERRED IN FAILING TO ENSURE THE SENTENCE DOES NOT EXCEED THE FIVE-YEAR STATUTORY MAXIMUM.

Quitiquit's third degree child rape convictions constitute Class C felonies, with a maximum sentence term of five years. RCW 9A.44.079(2); RCW 9A.20.021(1)(c). Although not employed by the court here, had it included a notation that the "combined term of

confinement and community custody for any particular offense cannot exceed the statutory maximum," and had it been prior to 2009 amendments to the relevant statute,[3] it would have been sufficient to impose a sentence that does not exceed the statutory maximum for the offense. See State v. Franklin, 172 Wn.2d 831, 263 P.3d 585 (2011) (under prior statutes, the Department of Corrections was allowed to recalculate community custody terms to ensure the combination of confinement and community custody did not exceed the statutory maximum), accord, In re Restraint of Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009). But the legislature amended RCW 9.94A.701(9) in 2009, and in 2012 the Supreme Court made it clear that sentencing courts, not the Department of Corrections, must reduce the community custody term

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[3] The controlling statute provides,

> The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

RCW 9.94A.701(9) (emphasis added) (effective July 26, 2009. Laws of 2009, ch. 375, § 5). For defendants who were sentenced after this statute became effective, the trial court is required to reduce the term of community custody to ensure that the total sentence is within the statutory maximum, and not the Department of Corrections. State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

to ensure the combination does not exceed the statutory maximum. Boyd, 174 Wn.2d at 473 (citing RCW 9.94A.701(9)). The proper remedy is to remand to the trial court to specify sentence terms that do not exceed the statutory maximum. Boyd, 174 Wn.2d at 473; State v. Land, 172 Wn. App. 593, 603, 295 P.3d 782, review denied, 177 Wn.2d 1016 (2013).

3. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Quitiquit "lacks sufficient funds to prosecute an appeal" and was therefore indigent and entitled to appointment of appellate counsel and production of an appellate record at public expense. CP 61-62. If Quitiquit does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. RCW 10.73.160(1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State's request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id. Accordingly, Quitiquit's ability to pay must be determined before discretionary costs are

imposed. Without a basis to rebut the trial court's determine that Quitiquit is indigent, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

D. CONCLUSION

The trial court's failure to properly instruct Quitiquit's jury about the deliberative process required to reach constitutionally valid verdicts requires reversal and remand for a new trial. In the alternative, this Court should remand with instruction to impose sentence within the statutory maximum period of five years.

DATED this ___ day of August 2016.

Respectfully submitted,

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